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October 10, 2018

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Dear Deputy Director Hoelscher, Associate Director Herrgott, Assistant Secretary James, and Assistant Administrator Ross:

Thank you for your webinar presentation to Western Governors' staff on the Administration's One Federal Decision policy and states' assumption of primary permitting authority under Clean Water Act (CWA) Section 404. Western Governors are eager to work in true partnership with the Administration and federal agencies to build a stronger state-federal relationship. By operating as authentic collaborators on the development and execution of policy, the states and federal government can improve their service to the public, resulting in a nation that is stronger, more resilient and united.

Specifically, Western Governors appreciate the Administration's interest in improving the administrative process and creating additional opportunities for state assumption of federal authority. Western Governors look forward to working with the Administration in the development of more efficient infrastructure permitting and environmental review processes. We can accomplish this while providing enhanced opportunities for state input and consultation, and conserving natural resource, wildlife, environmental quality, and cultural values.

On a related item, our staff was encouraged by the short discussion about CWA Section 401 authority. Western Governors are pleased to hear that the Administration no longer seeks statutory changes to the CWA that would restrict or eliminate the current delegations of authority authorized by the statute. Respecting and supporting current state authority under the law is an important foundation on which to build future opportunities. We also appreciate your efforts to provide additional opportunity for state assumption of federal authorities, such as the CWA Section 404 permitting authority. Taken together, these two significant actions signal a desire to work collaboratively with states to improve environmental regulatory processes. Western Governors would like to build on this positive momentum and begin to discuss concrete, definable actions we can jointly take to improve these processes.

To prepare for these discussions and opportunities, Governors would like to better understand the Administration's goals and plans for state delegation and infrastructure permitting and environmental reviews. Below are observations and questions regarding the Administration's recent actions concerning state delegation, permitting, and environmental review in the One

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Federal Decision policy, White House's Legislative Outline for Rebuilding Infrastructure in America (Infrastructure Plan), and CWA Section 404.

### **One Federal Decision Policy and Infrastructure Plan**

Executive Order (EO) 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects (EO), established the One Federal Decision policy for major infrastructure projects. This policy requires federal agencies to designate a single lead federal agency, then establish and adhere to a project timetable for federal environmental and authorization decisions. The policy establishes a goal of completing all federal decisions for major infrastructure projects within two years. The EO only addresses federal agencies (whether lead, cooperating, or participating) and does not discuss state delegation.

Following publication of the EO, the Office of Management and Budget (OMB) and Council on Environmental Quality (CEQ) issued a memorandum (Memorandum) on its implementation. This document includes a template Memorandum of Understanding (MOU) for federal agencies with each other. Several federal departments and agencies, including U.S. Army Corps of Engineers and Environmental Protection Agency (EPA), have executed an MOU modeled on the template. The MOU establishes non-federal cooperating agency responsibilities and includes non-federal cooperating agencies in the schedule for projects (Permitting Timetable). It also requires the schedule to "account for any federally-required decisions or authorizations, including those that are assumed by, or delegated to, State, tribal, or local agencies." It does not otherwise discuss state delegation.

The Infrastructure Plan sets forth the goal of, "delegating more decision-making to States and enhancing coordination between State and Federal reviews." The plan, however, it limits its recommendation of expanded delegation to states to the contexts of National Environmental Policy Act (NEPA) and Department of Transportation (DOT) non-NEPA project-level decisions. The Infrastructure Plan does not mention the CWA as an area for increased state delegation.

Your response to the following questions would help Western Governors better understand the Administration's One Federal Decision policy, its Infrastructure Plan, and the future implementation of these policies:

- How will the Administration ensure that state consultation is not compromised with the One Federal Decision policy's two-year goal for all permitting, authorization, and NEPA decisions?
- What processes did OMB and CEQ use to consult with states on the Memorandum, which could impact state NEPA, permitting, and authorization decisions?
- Do the references to cooperating agencies in the Memorandum include instances where states are delegated with authority by statutes other than NEPA, such as in the Clean Water Act or Clean Air Act?

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- Does the Permitting Timetable described in the MOU apply to state decisions or authorizations, such as those pursuant to the Clean Water Act or Clean Air Act? What will happen if a state fails to meet the deadline in the Permitting Timetable?
- What actions is the Administration taking to expand delegation of federal NEPA authority to states? Is this delegation intended to be on a project-by-project or programmatic basis? Will there be federal funding for state assumption of federal NEPA authority?
- What actions is the Administration taking to expand delegation of federal DOT project-level authority to states? Is this delegation intended to be on a project-by-project or programmatic basis? Will there be federal funding for state assumption of federal DOT authority?
- How is CEQ's review of its NEPA regulations being coordinated with the One Federal Decision policy? How is the Administration ensuring that the cooperating agency-lead agency relationship will be improved by this review of the NEPA regulations? What are CEQ's plans for consulting with Governors on its review of its regulations?

#### **Clean Water Act Section 404**

The Administration has expressed its commitment to empower more states and tribes to assume primary authority for the issuance of dredge-and-fill permits under Section 404 of the CWA. On August 7, the Army Corps of Engineers issued a memorandum adopting the findings of the EPA Assumable Waters Subcommittee's May 2017 Final Report. The report clarifies which waters may have administrative authority assumed by states and which waters would remain under the administrative authority of the Corps of Engineers.

Your response to the following questions would help Western Governors better understand the CWA Section 404 permitting program and issues involved with states' assumption of the program:

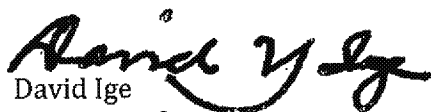
- Which states have expressed interest in assuming Section 404 permitting authority? What concerns have been expressed by state officials? What reasons have states provided for their interest in assuming Section 404 permitting authority?
- Beyond the lack of clarity as to which waters would be eligible for state assumption of administrative authority, what factors have states cited as prohibitive to their assumption of Section 404 permitting authority?
- How does state assumption of permitting authority under Section 404 relate to the One Federal Decision policy or Infrastructure Plan?
- How will the current rulemaking efforts of EPA and the Corps of Engineers to clarify "waters of the United States," as that term applies to the jurisdictional scope of the CWA, affect state permitting authority under Section 404 (where assumed by states)?

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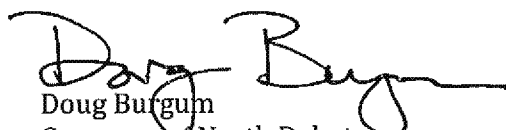
- What is the process for a state that would like to assume Section 404 authority? How can the Western Governors' Association best facilitate such assumption? Who at the EPA and Corps of Engineers are the best points of contact for Governors' offices to discuss assumption of Section 404 authority?
- Is there federal funding for state assumption of Section 404 authority? Will funds be shifted from other state-assumed programs under the CWA? If no new funds are to be designated for state Section 404 programs, how does the Administration envision states' implementation would be funded?
- What type of engagement with states and state consultation do the EPA and Corps of Engineers plan to undertake in the development of revised regulations addressing state assumption of Section 404 permitting authority?
- During the webinar, the Endangered Species Act (ESA) was identified as an area of potential complication in states' assumption of Section 404 permitting authority. What issues does the Administration anticipate may arise in the implementation of the ESA when states assume Section 404 permitting authority, particularly in the context of consultations under ESA Section 7? How have New Jersey and Michigan – the two states that have already assumed Section 404 permitting authority – addressed these issues?

The answers to these questions will help western states better understand the Administration's plans and goals regarding CWA and infrastructure permitting and environmental review, as well as the opportunities for expanded state delegation in these areas. We look forward to your responses and further discussion of these topics.

Sincerely,



David Ige  
Governor of Hawai'i  
Chair, WGA



Doug Burgum  
Governor of North Dakota  
Vice Chair, WGA